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Recommended Citation

Timothy P. Olson, *Taking the Fear out of Being a Tattletale: Whistle Blower Protection under the False Claims Act and Neal v. Honeywell, Inc.*, 44 DePaul L. Rev. 1363 (1995)
Available at: <https://via.library.depaul.edu/law-review/vol44/iss4/12>

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Timothy P. Olson is the winner of the First Annual
1994-95 DePaul Law Review Writing Competition.

**TAKING THE FEAR OUT OF BEING A TATTLETALE:
WHISTLE BLOWER PROTECTION UNDER THE FALSE
CLAIMS ACT AND *NEAL V. HONEYWELL, INC.****

INTRODUCTION

When young children misbehave, they never think they will be caught and are often amazed when a parent confronts them with their bad act. Children ask, "How did you know I did it?" To which the parent might reply, "I see everything because I have eyes in the back of my head." However, no one can see everything, and certainly no one has eyes in the back of their head. What many children do not understand is that authorities often need and receive help in catching cunning culprits. Without the watchful eyes of others, many culprits would never be caught.

This truth is clearly evident in government defense contracts where fraud is rampant and widespread. For instance, in 1985, forty-five of the one hundred largest defense contractors, and nine of the top ten, were under investigation for multiple fraud offenses against the United States government.¹ In terms of dollars lost to fraud, the result is even more staggering. Fraud has been estimated as draining between one to ten percent of the federal budget.² This means that using the government's 1985 spending level of one trillion dollars, fraud costs the government and, in turn, the taxpayers,

* The author of this Note gratefully acknowledges the assistance of Joshua G. Vincent, Hinshaw and Culbertson, Chicago, Illinois, and DePaul University College of Law Adjunct Faculty member, for providing the idea for this Note, as well as valuable insight and information necessary for its completion.

1. S. REP. NO. 345, 99th Cong., 2d Sess. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 (citing Hearings on Fed. Sec. L. and Def. Conf. before the subcomm. on oversight and investigations of the House Comm. on Energy and Com., 99th Cong. 1st Sess.)

2. *Id.*, *reprinted in* 1986 U.S.C.C.A.N. at 5268.

an estimated ten to one hundred billion dollars per year.³

For over a century, the United States Government has realized that it, like other authority figures, cannot keep tabs on all of its contractors. Therefore, it created the False Claims Act⁴ to provide private citizens with the authority to help curb fraudulent practices committed by government contractors. However, even school children know that blowing the whistle on someone can lead to negative repercussions, and employees are aware of the possibility of losing their job if they blow the whistle on their employer.⁵ Therefore, as part of the False Claims Act, Congress enacted provisions which reward private citizens who assist the government in ferreting out fraud and protect any employee assisting the government from employer retaliation.⁶

This Note discusses the protection section 3730(h) of the False Claims Act gives to employees who assist the government in identifying fraudulent defense contractors. Section I of this Note will examine the history of the False Claims Act and the recent district court decisions relating specifically to section 3730(h). Section II will analyze the recent decision of the United States Court of Appeals for the Seventh Circuit in *Neal v. Honeywell, Inc.*⁷ and section III will examine this decision in light of section II's discussion of the False Claims Act and section 3730(h). Finally, in section IV this author will argue that *Neal v. Honeywell, Inc.* is a step in the right direction to protecting employees from employer retaliation, but that more is necessary to make the employees "whole" under section 3730(h).

3. *Id.*

4. 31 U.S.C. §§ 3729-31 (1988).

5. Prior to the enactment of the whistleblower protections in the False Claims Act, private citizens instituted very few actions under the False Claims Act because they feared being left unemployed and penniless. Mark A. Thompson, *Cashing in on Military Fraud*, CAL. LAW., Oct. 1988, at 33; see *infra* notes 52-55 and accompanying text (comparing the number of actions private citizens filed before Congress enacted the whistle blower protection provisions of the False Claims Act with the number of actions private citizens filed after the enactment of the whistle blower protection provisions).

6. Throughout the history of the False Claims Act, the government has rewarded private citizens for their assistance in ferreting out contractor fraud. 31 U.S.C. § 3730(d)(1)-(2) (1988). The government has only recently provided protection to employees from employer retaliation. *Id.* § 3730(h) (1988). For a discussion of the history of the False Claims Act, see *infra* notes 8-84 and accompanying text.

7. *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

I. BACKGROUND

To fully comprehend the Seventh Circuit's holding in *Neal v. Honeywell, Inc.*, one must understand the history of the False Claims Act, and more specifically section 3730(h), as well as how section 3730(h) has been interpreted by the courts.

A. History of the False Claims Act

In 1863, the United States of America was in the midst of the Civil War. The Union Army was struggling to contain a rebel army which it vastly outnumbered in terms of both men and materials.⁸ One reason for the Union Army's struggle was that it was also waging a war against a different, less well-known adversary — its suppliers.⁹ While trying to defeat the rebel army, the Union military leaders had to contend with widespread corruption and fraud practiced by defense contractors which supplied the Union Army.¹⁰ Some companies sold the United States Cavalry the same horses and mules multiple times.¹¹ Others delivered defective supplies or no supplies at all. For instance, some unscrupulous contractors delivered bullets loaded with sawdust instead of gun powder.¹² Union soldiers opened crates expecting to find muskets, but found sawdust instead.¹³ Others wore boots that came apart at the seams in less than a week.¹⁴ And some slept in tents not waterproofed to Army specifications.¹⁵

To curb the widespread fraud and corruption, Congress enacted the False Claims Act (FCA) in 1863.¹⁶ The FCA is sometimes re-

8. James B. Helmer, Jr. & Robert C. Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the United States* ex rel. Gravitt v. General Electric Co. *Litigation*, 18 OHIO N.U. L. REV. 35, 35 (1991).

9. S. REP. NO. 345, *supra* note 1, at 8, reprinted in 1986 U.S.C.C.A.N. at 5273.

10. *Id.*; see also Kent D. Strader, *Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed in False Claims Act Cases*, 62 U. CIN. L. REV. 713, 728-29 (1993) (discussing difficulties the Union army encountered as a result of defense contractor fraud).

11. *Id.* at 728 n.90 (citing 132 CONG. REC. H6482 (statement of Rep. Berman)).

12. Thompson, *supra* note 5, at 33.

13. *Id.*

14. BILL GILBERT, *GOD GAVE US THIS COUNTRY* 145-52 (1989).

15. *Id.*

16. *United States v. Bornstein*, 423 U.S. 303, 309 (1976). In a footnote, the court noted that the FCA was adopted to punish and prevent fraud by government contractors. *Id.* at 309-10 n.5 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 952 (statements of Sen. Howard)). For the text of the original FCA, see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. In 1875, the FCA was re-enacted

ferred to as the "Abraham Lincoln Law"¹⁷ because President Lincoln urged its enactment in the face of such widespread corruption.¹⁸ At President Lincoln's insistence,¹⁹ the FCA included *qui tam*²⁰ provisions which encouraged private citizens to help prevent fraud by allowing them to file an action on behalf of themselves and the government.²¹ President Lincoln insisted on including the *qui tam* provisions because, as a small town lawyer, he knew the private bar could be a tremendous ally in the government's fight against defense contractor fraud.²²

Under the FCA as originally enacted, private citizens could file *qui tam* claims in which the government could recover damages, but could not intervene.²³ A *qui tam* plaintiff was entitled to half of the government's recovery, which included \$2,000 for each false claim and twice the resulting damages.²⁴ As stated by one court, the FCA was passed upon a theory as old as modern civilization — "one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain."²⁵ However, as originally enacted, the FCA did not protect an employee filing a *qui tam* action from employer retaliation.²⁶

as sections 3490-94 of the Revised Statute. See U.S. REV. STAT. tit. 36, §§ 3490-94 (1875). In 1976, section 5438 was codified under sections 231 to 235 of title 31 to United States Code. See 31 U.S.C. §§ 231-35 (1976). The FCA is now codified under sections 3729 to 3731 of title 31 of the United States Code. See 31 U.S.C. §§ 3729-31 (1982); see also Helmer & Neff, *supra* note 8, at 36 (stating that the FCA was enacted in response to deprivations suffered by the Union army).

17. 132 CONG. REC. H6479 (statement of Rep. Glickman); see also Strader, *supra* note 10, at 729 N.92 (describing why the FCA is sometimes termed the "Abraham Lincoln Law").

18. Eletta S. Callahan & Terry M. Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 302 (1992).

19. Helmer & Neff, *supra* note 8, at 36.

20. "Qui tam" derives from the Latin phrase, "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning, "he who brings the action for the king as well as for himself." Neal v. Honeywell, Inc., 826 F. Supp. 266, 268 (N.D. Ill. 1993) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1768)), *aff'd*, 33 F.3d 860 (7th Cir. 1994); see also BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

21. A private citizen who files an action under the FCA is generally referred to as a *qui tam* plaintiff. Neal, 826 F. Supp. at 268. *Qui tam* plaintiffs are also referred to as relators. See United States v. Griswold, 30 F.762, 763 (C.C.D. Or. 1887).

22. Helmer & Neff, *supra* note 8, at 35 (citing 132 CONG. REC. H6482 (statement of Rep. Berman)).

23. Strader, *supra* note 10, at 729-30.

24. Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. at 698; see also Strader, *supra* note 10, at 730 (describing a *qui tam* plaintiff's incentive for bringing a *qui tam* suit under the FCA).

25. Griswold, 30 F. at 766.

26. Strader, *supra* note 10, at 730.

Congress made the first changes to the FCA in 1943.²⁷ At this time, the United States government encountered another onslaught of defense contractor fraud while preparing for World War II.²⁸ During the 1940's, unlike the Civil War, the United States Government vigorously pursued violators of the FCA.²⁹ However, several plaintiffs filed *qui tam* actions which appeared to be based on criminal indictments which the government had instituted.³⁰ In fact, many resourceful individuals waited in federal courthouses and filed civil actions pursuant to the FCA immediately after the government brought criminal indictments against defense contractors.³¹ One such action, *United States ex rel. Marcus v. Hess*,³² opened the floodgates for *qui tam* litigation by holding that *qui tam* plaintiffs could base their claims on information already possessed by the government.³³ Accordingly, *qui tam* plaintiffs could bring suits based on the public information of criminal fraud indictments.³⁴

At the behest of then Attorney General Francis Biddle and in response to the Supreme Court's decision in *Marcus*, Congress amended the FCA in 1943.³⁵ Under the 1943 amendments, *qui tam* plaintiffs could no longer bring suits under the FCA if the suits were based upon information which the government already possessed.³⁶ The amendments also gave the government the power to intervene in *qui tam* actions.³⁷ Finally, the amendments reduced a *qui tam* plaintiff's recovery to twenty-five percent if acting without the gov-

27. For a discussion of the changes made to the FCA in 1943, see *infra* notes 35-41 and accompanying text.

28. Helmer & Neff, *supra* note 8, at 38.

29. *Id.*

30. S. REP. NO. 345, *supra* note 1, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 5275.

31. Helmer & Neff, *supra* note 8, at 38.

32. 317 U.S. 537 (1943). In *Marcus*, defendants were electrical contractors who had engaged in collusive bidding in contracts with "local governmental units" but were paid in part by the United States government. *Id.* at 539. Marcus brought civil suit under the FCA on his own behalf and in the name of the United States. *Id.* The government, who received \$54,000 from defendants in prior criminal proceedings, argued that Marcus should not be entitled to half of the \$315,000 recovered in the *qui tam* suit because he received his information from the criminal indictment, not from his own investigation. *Id.* at 545. The Court, however, ruled that the statute as written, did not require a plaintiff to bring a *qui tam* suit based on original information. *Id.* at 546-48.

33. Strader, *supra* note 10, at 730.

34. James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 704 (1993).

35. S. REP. NO. 345, *supra* note 1, at 10-12, *reprinted in* 1986 U.S.C.C.A.N. at 5275-77. For text of the amendments, see Act of Dec. 23, 1943, ch. 377, 57 Stat. 608.

36. Strader, *supra* note 10, at 730.

37. *Id.*

ernment's help and ten percent if the government intervened.³⁸ The dual purposes of the 1943 amendments were to discourage private litigants from instituting *qui tam* actions based on information already known to the government³⁹ and to end races to the courthouse between potential *qui tam* plaintiffs and the government.⁴⁰ The 1943 amendments to the FCA successfully furthered their purposes because they greatly reduced the number of *qui tam* claims filed by *qui tam* plaintiffs.⁴¹

In the 1980s, the United States was involved in an immense military peacetime buildup and was spending large sums of money on military hardware.⁴² Accordingly, the government once again faced widespread corruption and fraud on behalf of defense contractors.⁴³ During this period, instead of crates of sawdust and defective boots and tents,⁴⁴ the government was facing alarming reports of \$400 hammers and \$7,000 coffee pots.⁴⁵ In response to the highly prevalent fraud and corruption and due to inadequate enforcement procedures, Congress sought to revive the *qui tam* provisions by amending the FCA in 1986.⁴⁶ Under the 1986 amendments, *qui tam* plaintiffs could bring suits based on information already known to the government, but could not bring suits based on ongoing proceedings.⁴⁷ Congress also increased the liability for violations of the

38. *Id.*

39. *United States ex rel. Bayarsky v. Brooks*, 210 F.2d 257, 259 (3d Cir. 1954); *United States ex rel. Sherr v. Anaconda Wire & Cable Co.*, 57 F. Supp. 106, 107-08 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir. 1945), *cert. denied*, 326 U.S. 762 (1945).

40. *United States v. Baker-Lockwood Mfg. Co.*, 138 F.2d 48, 53 (8th Cir. 1943), *vacated*, 321 U.S. 744 (1944). *See generally*, Helmer & Neff, *supra* note 8, at 38-39 (stating that one reason the FCA was amended in 1943 was to eliminate the races to the courthouse between the government and private litigators).

41. Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1066 (1991); *see also*, Evan Caminker, Note, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 343-44 n.12 (1989) (attributing the "virtual dormancy throughout the past half-century" of *qui tam* actions to the severe jurisdictional restrictions Congress imposed on *qui tam* actions through the 1943 amendments).

42. Helmer & Neff, *supra* note 8, at 40-41 (citing 136 CONG. REC. S15,459 (daily ed. Oct. 17, 1990) (statement of Sen. Sasser)).

43. *Id.*

44. *See supra* notes 8-15 and accompanying text (discussing fraudulent practices by Civil War defense contractors).

45. 131 CONG. REC. H5135 (statement of Rep. Weiss).

46. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153-69 (codified as amended at 31 U.S.C. §§ 3729-33 (1988)); *see also* Tedd J. Kochman & Garen Meguerian, *False Claims*, 31 AM. CRIM. L. REV. 525, 534 (1994) (discussing the motivation behind 1986 amendments to the FCA).

47. 31 U.S.C. § 3730(d)(3) (1988). Thus, the 1986 amendments "remain faithful to the spirit

FCA to include treble damages and a civil penalty between \$5,000 and \$10,000 for each instance of violation.⁴⁸ The 1986 amendments increased the percentage of a *qui tam* plaintiff's guaranteed recovery to between fifteen and twenty-five percent if the government intervened⁴⁹ and between twenty-five and thirty percent if the *qui tam* plaintiff pursued the claim without the help of government intervention.⁵⁰ Finally, through the 1986 amendments, Congress prohibited employers from retaliating against employees who brought suit under the FCA.⁵¹

Prior to the 1986 amendments, private citizens did not institute many actions under the FCA because they feared being left unemployed and penniless.⁵² In fact, immediately prior to the 1986 amendments, six or fewer *qui tam* claims were being brought under the FCA each year.⁵³ However, in the seven years subsequent to the 1986 amendments, *qui tam* plaintiffs filed approximately 600 claims,⁵⁴ compared with only twenty *qui tam* claims filed in the ten years prior to the 1986 amendments.⁵⁵

In 1988, Congress again amended the FCA.⁵⁶ The 1988 amendments were intended to eliminate recovery for a *qui tam* plaintiff

of . . . preventing parasitic lawsuits . . . without frustrating the goals of the *qui tam* provisions." Helmer & Neff, *supra* note 8, at 50.

48. 31 U.S.C. § 3729(a) (1988).

49. *Id.* § 3730(d)(1). The size of a *qui tam* plaintiff's recovery under this subsection is determined by "the extent to which the person substantially contributed to the prosecution of the action." *Id.*; see also Kochman & Meguerian, *supra* note 46, at 537 (discussing the amount *qui tam* plaintiffs may recover under § 3730(d)(1)); see *supra* notes 8-41 and accompanying text (discussing damages and penalties before the 1986 amendments to the FCA).

50. 31 U.S.C. § 3730(d)(2) (1988). The size of a *qui tam* plaintiff's recovery under this subsection is determined by what the judge deems reasonable within the twenty-five to thirty percent parameters. *Id.*; see also Kochman & Meguerian, *supra* note 46, at 537 (discussing the amount *qui tam* plaintiffs may recover under § 3730(d)(2)); see *supra* notes 23-41 and accompanying text (discussing a *qui tam* plaintiff's share in recovery under the FCA prior to the 1986 amendments).

51. 31 U.S.C. § 3730(h) (1988); see also John T. Boese, *Qui Tam: Beyond Government Contracts*, in LITIGATION 1993, at 551 (PLI Litig. & Admin. Practice Course Handbook Series No. 456, 1993) (stating that the FCA "prevents the harassment, retaliation, or threatening of employees who assist in or bring *qui tam* cases"); see *infra* notes 59-84 and accompanying text (discussing the protections the 1986 amendments to the FCA grant employees).

52. Thompson, *supra* note 5, at 33.

53. Callahan & Dworkin, *supra* note 18, at 303.

54. In these cases, the government has recovered approximately five-hundred million dollars. Kochman & Meguerian, *supra* note 46, at 537.

55. *Id.* (citing Letter from Frank W. Hunger, Assistant Attorney General, United States Dept. of Justice to Sen. Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice, United States Senate Committee on the Judiciary (Sept. 2, 1993) (on file in the United States Senate)).

56. Pub. L. No. 100-700, § 9, 102 Stat. 4638 (1988) (codified at 31 U.S.C. § 3730(d)(3)).

who was the "principal architect" of the fraud,⁵⁷ but did not intend to eliminate recovery for a *qui tam* plaintiff who was convicted of participating in the fraud, but played only a minor role in the fraud.⁵⁸

B. Section 3730(h) of the False Claims Act

Section 3730(h) of the FCA discourages employers from harassing, retaliating against, threatening or in any other manner discriminating against any employee who assists in or brings suit under the FCA.⁵⁹ Any employee who has experienced such discrimination by his or her employer is entitled to be made whole.⁶⁰ This includes: reinstatement at the same seniority position the employee would have obtained but for the discrimination, double back pay with interest⁶¹ and "compensation for any special damages sustained as a result of the discrimination."⁶² The scope of the term, "special damages," is not defined by the FCA,⁶³ although it clearly includes litigation costs and reasonable attorneys' fees.⁶⁴

The legislative history behind section 3730(h) indicates that it had a twofold purpose. First, the section was intended to encourage

57. Helmer & Neff, *supra* note 8, at 50-51.

58. *Id.*

59. Section 3730(h) provides, in its entirety:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730 (h) (1988).

60. *Id.* For the text of Section 3730(h), see *supra* note 59.

61. 31 U.S.C. § 3730(h) (1988). To avoid unjust compensation to an employee who recovers under this section, the interest payment should be calculated before the back pay is doubled. H.R. REP. NO. 660, 99th Cong., 2d Sess. 23 (1986).

62. *Id.* Section 3730(h) also specifically provides for litigation costs and reasonable attorneys' fees.

31 U.S.C. § 3730(h) (1988). For the text of Section 3730(h), see *supra* note 59.

63. See 31 U.S.C. §§ 3729-31 (1988).

64. The legislative history of Section 3730(h) indicates that the scope of the term, "special damages," is to extend beyond litigation costs and reasonable attorney's fees. See *infra* notes 65-72. However, the term "special damages," clearly includes litigation costs and reasonable attorneys' fees. 31 U.S.C. § 3730(h) (1988). For the full text of Section 3730(h), see *supra* note 59.

private citizens to assist in the government's fraud enforcement effort⁶⁵ without the fear of losing their job or personal security.⁶⁶ The necessity of encouraging private citizens to assist in exposing Government contractor fraud became clear after several individuals testified about the difficult decisions they faced before "blowing the whistle" on their employers.⁶⁷ Therefore, to encourage the assistance of employees, the relief portion of section 3730(h) was designed, in part, to make the employee whole again if the employer retaliated and to resolve the problem of a potential plaintiff being unable to afford to institute an action.⁶⁸

The second purpose of section 3730(h) was to provide punishment and deterrence for any employer who engaged in retaliatory action against an employee.⁶⁹ A lack of effective deterrence was thought to be one of the reasons fraud was so pervasive and costly to the government.⁷⁰ Congress felt that an effective vehicle for private individuals to expose fraud was necessary for meaningful fraud deterrence.⁷¹ Accordingly, the relief portion of section 3730(h) was also designed to provide stiff penalties for employers who retaliated

65. S. REP. NO. 345, *supra* note 1, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. To help encourage assistance, "incentives for exposing fraud should be available in as many forms as possible." *Id.* at 29, *reprinted in* 1986 U.S.C.C.A.N. at 5295. The Major Fraud Act, 18 U.S.C. § 1031 (Supp. V 1993) (MFA), contains a nearly identical whistle blower protection provision. 18 U.S.C. § 1031(h) (Supp. V 1993). The MFA's whistle blower protection provision was patterned after the FCA's and was intended to provide for the "granting of broad relief." S. REP. NO. 503, 100th Cong. 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5969, 5971; *see also id.* at 15, *reprinted in* 1988 U.S.C.C.A.N. at 5979 (stating that the MFA's whistle blower protection provision "is similar to the one included in the False Claims Act").

66. *False Claims Act Amendments: Hearings Before the Subcomm. on Administrative Law and Governmental Relations*, 99th Cong., 2d Sess. 405 (1986) [hereinafter *Hearings*] (statement of John R. Phillips).

67. One such individual, Robert Wityczak, testified about exposing the mischarging practices of his employer, Rockwell International. S. REP. NO. 345, *supra* note 1, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 5270. Wityczak testified that he agonized over his decision to step forward because he had to consider supporting his wife and five children and paying his house mortgage. *Id.* After deciding to report the mischarging and before his ultimate discharge, Wityczak testified he "was squeezed out of the work [he] was doing . . . and put to work doing menial tasks outside [his] job description." *Id.* Wityczak concluded that, from his own experience and talking with his co-workers, there is "absolutely no encouragement or incentive" for employees in the defense industry to report fraud. *Id.*

68. *Hearings*, *supra* note 66, at 406 (testimony of John R. Phillips); *see supra*, notes 60-64 and accompanying text (discussing the relief provided by Section 3730(h)).

69. *Hearings*, *supra* note 66, at 405 (testimony of John R. Phillips).

70. S. REP. NO. 345, *supra* note 1, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5269. In 1984, the Economic Crime Council of the Department of Justice concluded that defense procurement programs was an economic crime area where stronger deterrence was needed. *Id.* at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

71. *Id.* at 15, *reprinted in* 1986 U.S.C.C.A.N. at 5279.

against an employee who provided assistance to the government.⁷²

Despite its broad use in virtually every *qui tam* case, case law interpreting section 3730(h) is very sparse.⁷³ One issue relating to section 3730(h) which has been the subject of written opinions is whether recovery under the section requires a *qui tam* action to be filed. Decisions on this issue have been split. In *Rehman v. ECC International Corporation*,⁷⁴ the United States district court in Florida stated that the section should be broadly construed because its intent is to assure employees that their jobs would not be endangered if they investigate and report possible misconduct of government contractors, "regardless of the informality or nascent status of the proceeding."⁷⁵ Thus, according to the *Rehman* court, a *qui tam* action is not required for a plaintiff to gain recovery under section 3730(h). The United States district court in California in *United States ex rel. Kent v. Aiello*⁷⁶ reached the same conclusion.⁷⁷ In *Kent*, the court stated that section 3730(h) extends coverage beyond *qui tam* plaintiffs to those who suffer harm after making an internal corporate complaint relative to fraud against the government, even when no *qui tam* lawsuit is ever filed.⁷⁸

Other courts have concluded that a *qui tam* action is necessary for a plaintiff to recover pursuant to section 3730(h). In *Casarez v. Delco Sys. Operations*,⁷⁹ another United States district court in Cal-

72. *Hearings*, *supra* note 66, at 405 (testimony of John R. Phillips) (stating that, as part of the stiff penalties, an employer could be liable to the employee for double back pay, special damages and, if warranted, punitive damages); *see supra*, notes 60-64 and accompanying text (discussing the relief provided by Section 3730(h)).

73. Boese, *supra* note 51, at 551. According to Boese, section 3730(h) has been the subject of few written opinions because it "is poorly drafted." *Id.*

74. *Rehman v. ECC Int'l Corp.*, No. 90-425-Civ-Orl-22, 1993 WL 85758 (M.D. Fla. 1993). In *Rehman*, the employer argued that, because the employee never notified them that he was acting under the FCA, they could not have retaliated against the employee on that basis. *Id.* at *2. The court, however, rejected the employer's narrow interpretation of the section and denied the employer's motion for summary judgment. *Id.*

75. *Id.*

76. *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720 (E.D. Cal. 1993). In *Kent*, plaintiff informed the government of allegedly false claims defendants were making to the Farmers Home Administration (FmHA). *Id.* at 722. Plaintiff alleged that she uncovered the information during the course of her employment and that she was terminated "in retaliation for lawful acts done in furtherance of the *qui tam* action." *Id.* After noting that Section 3730(h) extends protection beyond a *qui tam* plaintiff, the court held that Section 3730(h) clearly provided protection to plaintiff, a *qui tam* plaintiff. *Id.* at 724.

77. *Id.* at 723-24.

78. *Id.*

79. *Casarez v. Delco Sys. Operations*, No. CV 92-6844 AWT, 1993 U.S. Dist. LEXIS 4387 (C.D. Cal. 1993). In *Casarez*, plaintiff did not respond to defendant's motion to dismiss and the

ifornia interpreted the language of section 3730(h) to mean that the actual filing of a *qui tam* lawsuit is an absolute prerequisite to a retaliation suit under section 3730(h).⁸⁰ In *X Corp. v. Doe*,⁸¹ a United States district court in Virginia stated that a plaintiff must be able to prove acts in furtherance of a *qui tam* action in order to obtain recovery under section 3730(h).⁸² In *Hardin v. DuPont Scandinavia*,⁸³ a United States district court in New York held that relief under section 3730(h) is limited to "employees" and suggested that, to obtain recovery, steps must be taken in furtherance of a *qui tam* action.⁸⁴

II. SUBJECT OPINION — *NEAL v. HONEYWELL, INC.*

A. *Factual Background and Procedural History*

In 1987, Judith Neal (Neal) was an employee at the Joliet Army Arsenal Plant which Honeywell, Inc. (Honeywell) administered.⁸⁵ During the course of her employment, Neal discovered that several of her co-workers were falsifying ballistics tests reports on ammunition the plant manufactured and that the plant was selling the defective ammunition to the United States Army.⁸⁶ Through her own investigation, Neal also discovered that Honeywell's conspiracy to falsify test data had been occurring since at least 1983 and that

court made its decision without the benefit of an argument in opposition to defendant's argument. *Id.* at *1.

80. *Id.* at *2.

81. *X Corp. v. Doe*, 816 F. Supp. 1086 (E.D. Va. 1993). In *X Corp.*, an in-house attorney of a computer manufacturer/supplier was allegedly fired after he investigated possible fraudulent claims by his employer against the federal government and urged the employer to comply with federal regulations. *Id.* at 1089-90. In the course of his investigation, the attorney distributed articles relating to *qui tam* actions to other in-house attorneys and secretly copied several files which he believed to show that his employer defrauded the federal government. *Id.* at 1090-91. The court held that the attorney had not stated a cause of action under section 3730(h) because he could not prove "(i) he took acts in furtherance of a *qui tam* suit; (ii) [his employer] knew of these acts; and (iii) [his employer] discharged him because of these acts." *Id.* at 1095.

82. *Id.* at 1095-97.

83. *Hardin v. DuPont Scandinavia*, 731 F. Supp. 1202 (S.D.N.Y. 1990). In *Hardin*, plaintiff sought recovery under section 3730(h) after she lost commissions because she refused to participate in her employer's allegedly unlawful scheme to avoid income taxes. *Id.* The court stated that plaintiff, either an independent contractor or partner with defendants, did not fall under the protection section 3730(h) provides for employees. *Id.* at 1205. The court also stated that plaintiff had failed to state a 3730(h) claim because her "alleged loss was the result of her refusal to participate in the alleged scheme, not the result of steps taken in furtherance of the action." *Id.*

84. *Id.*

85. *Neal v. Honeywell, Inc.*, 33 F.3d 860, 860 (7th Cir. 1994).

86. *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 267 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994).

company executives were probably aware of the fraud.⁸⁷ During the conspiracy, Honeywell's fraudulent conduct cost the government over fifteen million dollars.⁸⁸

Neal called an internal company "hotline" to report the company's fraudulent conduct and inquire about her options.⁸⁹ A Honeywell attorney answered the call and informed Neal that she could report the conduct to him and retain her anonymity, but did not inform Neal that she could proceed under the FCA⁹⁰ and file a *qui tam* suit.⁹¹ After Neal's disclosure, Honeywell began an internal investigation and notified the United States Army.⁹² Honeywell's investigation led senior managers of Honeywell and public prosecutors to conclude that Neal did in fact discover fraudulent conduct on behalf of Honeywell and several of its employees.⁹³ As a result of the investigation, Honeywell and the government agreed to a settlement without requiring the United States to bring a civil suit under the FCA.⁹⁴ Under the terms of the settlement, Honeywell gave the government approximately \$2.5 million worth of cash and ammunition.⁹⁵ Honeywell's investigation also resulted in the United States Attorney filing two criminal informations against two Honeywell employees who plead guilty to the charges.⁹⁶

During Honeywell's three-month investigation and after the United States and Honeywell resolved the matter, Honeywell discriminated against and harassed Neal.⁹⁷ Honeywell supervisors took umbrage against Neal's disclosure because they believed she threatened Honeywell's defense contract with the government and thus their jobs.⁹⁸ No one at Honeywell ever questioned Neal about her discoveries and Honeywell isolated Neal from the investiga-

87. Appellee's Brief at 2, *Neal* (No. 93-3013).

88. *Id.*

89. 826 F. Supp. at 267; see also Appellee's Brief at 2, *Neal* (No. 93-3013).

90. 31 U.S.C. §§ 3729-31 (1988) (stating that, because Neal did not trust Honeywell executives and was concerned for her personal safety, she called Honeywell's "hotline" for advice on exposing the fraud while maintaining her anonymity).

91. Appellee's Brief at 2-3, *Neal* (No. 93-3013).

92. *Neal v. Honeywell, Inc.*, 33 F.3d 860, 861 (7th Cir. 1994).

93. *Id.*

94. *Id.*

95. *Id.* The exact terms of the settlement were \$2,013,813 in cash and ammunition worth \$408,872 delivered free of charge. Appellee's Brief at 3, *Neal* (93-3013).

96. *Id.*; see also Appellee's Brief at 3, *Neal* (93-3013).

97. 33 F.3d at 860; see also, Appellee's Brief at 3, *Neal* (93-3013).

98. 33 F.3d at 860.

tion.⁹⁹ Members of the plant's management physically threatened Neal and told her that her fellow employees hated her.¹⁰⁰ In addition, Honeywell did not allow Neal to have contact with other employees unless her supervisor otherwise directed.¹⁰¹ Neal interpreted the discrimination and harassment as an instruction to vamoose¹⁰² and so feared for her physical safety and professional future that she quit her position with Honeywell in August of 1987.¹⁰³

In 1993, Neal instituted an action against Honeywell under section 3730(h) of the FCA contending that she had been threatened, harassed and constructively discharged as a result of "lawful acts . . . in furtherance of an action under [section 3730(h) of the FCA]."¹⁰⁴ Neal sought the income she lost when she quit and the recovery she could have had under the FCA's *qui tam* provision¹⁰⁵ if Honeywell's in-house counsel had informed her of her right to bring a *qui tam* suit.¹⁰⁶ Honeywell moved to dismiss Neal's claim pursuant to Federal Rule of Civil Procedure 12(b)(6)¹⁰⁷ arguing that Neal was not protected from retaliation by the FCA because no suit was filed under the FCA.¹⁰⁸ Honeywell also moved to strike the portion of Neal's prayer for relief seeking the damages she would have been entitled to under a *qui tam* suit.¹⁰⁹ The district court denied Honeywell's motion to dismiss and found that Neal was protected by section 3730(h).¹¹⁰ The district court also declined to strike the request for *qui tam* damages. Honeywell appealed the denial of their motions to dismiss and strike,¹¹¹ but the United States Court of Appeals for the Seventh Circuit affirmed the district court's find-

99. Neal v. Honeywell, Inc., 826 F. Supp. 266, 267 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994).

100. *Id.*

101. Appellee's Brief at 3, Neal (93-3013).

102. 33 F.3d at 860.

103. Appellee's Brief at 3, Neal (93-3013).

104. 33 F.3d at 860 (quoting 31 U.S.C. § 3730(h) (1988)).

105. The FCA gives private persons the right to bring a civil action for violations of the FCA on behalf of themselves and the United States Government. 31 U.S.C. § 3730(b) (1988); *see supra* notes 49-50 and accompanying text (discussing a private person's share in the government's recovery in such an action).

106. 33 F.3d at 864.

107. Rule 12(b)(6) allows a party to move for a dismissal based on a "failure to state a claim upon which relief can be granted." *See* FED. R. CIV. P. 12.

108. 33 F.3d at 861.

109. Neal v. Honeywell, Inc., 826 F. Supp. 266, 273 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994).

110. *Id.*

111. 33 F.3d at 861-62.

ing that section 3730(h) afforded protection to Neal.¹¹² In addition, the Seventh Circuit concluded that Neal was not entitled to the recovery she could have received had she been informed of her right to proceed under a *qui tam* suit.¹¹³

B. The District Court's Reasoning

In holding that Neal was afforded protection under section 3730(h) of the FCA, the district court looked to the purpose of the FCA and its *qui tam* provision.¹¹⁴ The court stated that the purpose of the FCA is "to discourage fraud against the government[, and] the purpose of the *qui tam* provision . . . is to encourage those with knowledge of the fraud to come forward."¹¹⁵ The court also noted that the FCA, in its present form, has a "whistleblower protection clause" which clearly protects, from employer retaliation, those who bring a *qui tam* action and those who initiate, investigate, testify or assist in "an action filed or to be filed" under the FCA.¹¹⁶

But, Neal did not divulge her information to the government.¹¹⁷ Instead, she told company superiors who in turn reported the wrongdoing to the government.¹¹⁸ Therefore, the issue before the court was "whether an internal whistleblower may state a claim under the whistleblower protection provisions of the [FCA] when no lawsuit was ever filed, either by the whistleblower or another informer as a *qui tam* relator, or by the government."¹¹⁹

In making its determination, the court first noted that whistleblower protection statutes are remedial in nature and are to be broadly construed so that internal whistle blowing is to be included even if the conduct involved does not come under a literal reading of the statute.¹²⁰ Accordingly, the court reasoned that, even

112. *Id.* at 862-64.

113. *Id.* at 865.

114. *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 269 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 270. For a discussion of the steps taken by Neal and Honeywell to disclose the information to the government, see *supra* notes 85-103.

119. 826 F. Supp. at 270.

120. *Id.* The court based its reasoning on several decisions of other courts which extended protection to internal whistle blowers under different, but similarly worded statutes. *Id.* See generally *NLRB v. Scrivener*, 405 U.S. 117 (1972) (National Labor Relations Act); *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993) (Clean Water Act, 33 U.S.C. § 1367); *Jones v. Tennessee Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991) (Pre-amend-

though Neal's conduct does not fall literally within the FCA, the great weight of authority makes it clear that courts should liberally construe section 3730(h) of the FCA to protect conduct which does not fall within the literal language of the statute.¹²¹ The court noted that it would make little sense to ignore someone like Neal, "whose bold conduct led to a quick, voluntary and efficient disclosure of the fraud and reparation to the government" while protecting a *qui tam* plaintiff who filed an expensive and time consuming lawsuit.¹²² Therefore, the court held that section 3730(h) of the FCA "forbids discrimination against an employee who has made an intracorporate complaint about fraud against the government."¹²³

As to Honeywell's request to strike Neal's request for *qui tam* damages, the district court denied Honeywell's request, but also declined to make any determination as to the validity of Neal's theory for recovery.¹²⁴ The court did state, however, that Neal's theory — that she was defrauded of a valid *qui tam* action when the Honeywell "hotline" attorney did not inform her of its availability — may be "an effective guide to the jury when awarding damages" because section 3730(h) grants a whistleblower "all relief necessary to make the employee whole."¹²⁵

Finally, the district court certified the following issue for interlocutory appeal: Whether the whistleblower protection provision of the FCA, 31 U.S.C. § 3730(h), applies where an employee presents evidence of fraud to her superiors who then voluntarily investigate the matter, disclose the results to the government and pay reparation without a *qui tam* lawsuit ever being filed.¹²⁶

C. The Seventh Circuit's Reasoning

In affirming the district court's holding, the United States Court of Appeals for the Seventh Circuit agreed that section 3730(h) of

ment Energy Reorganization Act, 42 U.S.C. § 5851(a)); Rayner v. Smirl, 873 F.2d 60, 63-64 (4th Cir. 1989) (Federal Railroad Safety Act, 45 U.S.C. § 441(a)); Baker v. Interior Bd. of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978) (Mine Safety Act, 30 U.S.C. § 820(b)(1)). But see Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1031-32 (5th Cir. 1984) (holding that Pre-amendment Energy Reorganization Act does not protect internal whistleblowing).

121. 826 F. Supp. at 271.

122. *Id.* at 273.

123. *Id.*

124. *Id.*

125. *Id.* (quoting 31 U.S.C. § 3730(h) (1988)).

126. *Id.* at 274.

the FCA protected Neal from Honeywell's retaliation.¹²⁷ The court first examined the scope of the phrase, "action filed or to be filed" found in section 3730(h).¹²⁸ Noting that the FCA protects "lawful acts done by the employee . . . in furtherance of an action under this section,"¹²⁹ the court stated that each time the word "action" appears in section 3730 it suggests legal proceedings and that section 3730(h) uses the word "action" in the same sense as other subsections of section 3730.¹³⁰ Consequently, the court found that litigation is not a condition subsequent to perfect protection for investigatory activities that were protected at the time of their commission.¹³¹ The court held that Neal's actions were protected because, when Neal informed Honeywell of her discovery, litigation was a distinct possibility and the phrase "filed or to be filed" in section 3730(h) links protection to events as they were understood at the time of the investigation.¹³²

The court also noted that nothing in the language or background of section 3730(h) suggested that, by paying the government enough to settle without a lawsuit, "employers acquire the right to shoot the bearers of bad tidings."¹³³ However, according to the court, the language "to be filed" does limit the protection to whistle blowers with legitimate claims.¹³⁴ Thus, an employer may legitimately retaliate against an employee who fabricates a tale of fraud in an attempt to receive concessions from the employer in exchange for the employee's silence.¹³⁵

The Seventh Circuit also concluded that Neal's theory of dam-

127. *Neal v. Honeywell, Inc.*, 33 F.3d 860, 865 (7th Cir. 1994). The court initially noted that section 3730(h) had never been construed or even cited by a court of appeals and invited the United States to file a brief as *amicus curiae*. *Id.* at 863. The United States determined that the statute supported Neal "without a thumb on the scales of justice." *Id.* The court of appeals agreed with this assessment. *Id.*

128. *Id.* at 863-64.

129. 31 U.S.C. § 3730(h) (1988).

130. 33 F.3d at 863.

131. *Id.* at 864.

132. *Id.* In holding that Neal's actions were protected by the FCA, the court refused to follow the holdings of *Casarez v. Delco Sys. Operations*, No. CV 92-6844 AWT, 1993 U.S. Dist. LEXIS 4387 (C.D. Cal. 1993), *X Corp. v. Doe*, 816 F. Supp. 1086 (E.D. Va. 1993) and *Hardin v. DuPont Scandinavia*, 731 F. Supp. 1202 (S.D.N.Y. 1990). For a discussion of the *Casarez*, *X Corp.* and *Hardin* cases, see *supra* notes 73-84 and accompanying text.

133. *Neal*, 33 F.3d at 864.

134. *Id.*

135. *Id.* Neal's conduct, however, did not amount to an illegitimate claim against Honeywell. According to the court, "Neal's report was not a figment of her imagination; two guilty pleas and a hefty settlement show that civil litigation was a real possibility." *Id.*

ages was unfounded because the FCA does not require an employer to inform its employees of their rights under the FCA.¹³⁶ The court stated that damages under section 3730(h) are not to be a substitute for the recovery an employee could have had in a *qui tam* suit.¹³⁷ According to the court, section 3730(h) compensates an employee for harm caused by harassment and discharge and is limited to those damages expressed in its language.¹³⁸

According to the Seventh Circuit, allowing such a recovery in cases where the government did not sue would cause deleterious effects. First, defendants would be exposed to double recovery, which would lessen the likelihood of future settlements and reduce the amount a defendant would be willing to pay the government.¹³⁹ It would also encourage employees to pursue retaliation claims in doubtful cases.¹⁴⁰ On a larger scale, the court felt that American consumers would ultimately foot the bill if the courts allowed such a recovery because defense contractors would pass the increased cost of providing services to their customers—federal taxpayers.¹⁴¹

III. ANALYSIS

When Congress enacts a statute without defining its ambiguous terms, the courts often face the difficult task of deciding exactly what Congress meant. In this case of first impression, the Seventh Circuit Court of Appeals was forced to determine the meanings of the ambiguous phrases “action filed or to be filed” and “special damages” in order to decide whether Neal was entitled to recover damages from her employer, Honeywell, under section 3730(h) of the FCA and, if so, the extent of her recovery. The Seventh Circuit correctly decided that Neal was entitled to recover damages from Honeywell. However, the court erroneously decided to limit Neal’s

136. *Id.* at 865. *But see* *Phillips v. Interior Bd. of Mine Operators Appeals*, 500 F.2d 722, 781 (D.C. Cir. 1974) (explaining that an employer should inform its employees of their rights under the whistleblower provision of the Mine Safety Act, 30 U.S.C. § 820(b)(1)); *see also* Appellee’s Brief at 19, *Neal* (93-3013) (arguing that, based on *Phillips*, Honeywell had a duty to inform Neal of her *qui tam* rights).

137. *Neal*, 33 F.3d at 864.

138. *Id.* at 865. Section 3730(h) expressly provides for reinstatement with the same seniority status, twice the amount of back pay plus interest, compensation for any special damages sustained because of the discrimination, court costs and reasonable attorneys’ fees. 31 U.S.C. § 3730(h) (1988). For the full text of section 3730(h), *see supra* note 59.

139. *Neal*, 33 F.3d at 864.

140. *Id.*

141. *Id.* at 865.

recovery to only those damages specifically enumerated in section 3730(h).

A. The Seventh Circuit Correctly Found That Neal Was Entitled to Recover

In *Neal*, the Seventh Circuit held that Neal was entitled to recover because it determined that the phrase "action filed or to be filed" did not make *qui tam* litigation a condition subsequent to receiving protection under section 3730(h) of the FCA.¹⁴² This finding is correct because it comports with the purpose and legislative history of the FCA and section 3730(h), case law relying on the legislative history, and the holdings of cases which construed similar whistle blower provisions in other statutes.

First, the purpose and legislative history of the FCA and section 3730(h) support Neal's recovery. One of the purposes of the FCA is to encourage private citizens to help the government eliminate or reduce fraud by granting them the right to bring an action on behalf of themselves and the government against unscrupulous Government contractors.¹⁴³ Unfortunately, many private citizens refused to institute actions under the FCA because they feared retaliation in the form of termination by their employer.¹⁴⁴ Consequently, Congress amended section 3730(h) to the FCA in 1986¹⁴⁵ to encourage employees to assist the government in ferreting out fraudulent contractors by providing the employees protection against wrongful employer retaliation.¹⁴⁶

In *Neal*, the court held that Neal was entitled to a recovery because it found that a *qui tam* litigation was not a condition subsequent to being afforded protection under section 3730(h) of the FCA.¹⁴⁷ Although the text of section 3730(h) does not expressly provide for protection in the event that a *qui tam* suit is never insti-

142. *Id.* at 864.

143. See *supra* notes 65-72 and accompanying text (describing the impetus behind the enactment of the FCA).

144. See *supra* notes 52-55 and accompanying text (noting the absence of *qui tam* claims prior to the amendment of Section 3730(h)).

145. For a discussion of the 1986 amendments to the FCA, see *supra* notes 42-55.

146. Section 3730(h) encourages employees to assist the Government by granting the employees all relief necessary to make them whole. 31 U.S.C. § 3730(h) (1988). For the full text of section 3730(h), see *supra* 59. For a discussion of the purposes of section 3730(h), see *supra* notes 65-72.

147. *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994); see *supra* notes 127-42 (discussing the court's reasoning).

tuted, this interpretation is in line with the purpose and legislative history of section 3730(h) and the FCA because it provides protection to employees who disclose conduct which they believe to be fraudulent even if the conduct turns out to be legitimate. Thus, the holding encourages employees to disclose potentially fraudulent claims by providing them protection even if a *qui tam* claim is never instituted. Accordingly, in the spirit of the FCA, the holding helps reduce and eliminate fraudulent claims against the government,¹⁴⁸ and the court's decision is consistent with the legislative history and purpose of the FCA and section 3730(h).

Neal's recovery is also supported by case law. Although case law interpreting section 3730(h) is sparse, the cases which do interpret section 3730(h) in light of its legislative history support the finding of the Seventh Circuit.¹⁴⁹ In *Rehman v. ECC Int'l Corp.*,¹⁵⁰ the court held that a *qui tam* lawsuit is not required for a plaintiff to recover damages under section 3730(h) after it stated that section 3730(h) should be broadly construed to assure protection to employees who report potential misconduct by their employer.¹⁵¹ In *United States ex rel. Kent v. Aiello*,¹⁵² the court also concluded that a *qui tam* lawsuit is not required for a plaintiff to receive protection under section 3730(h). Case law interpreting similar whistle blower provisions in other statutes also supports the Seventh Circuit's holding by stating that internal corporate whistle blowers should be afforded protection.¹⁵³ Thus, the Seventh Circuit's finding that Neal is entitled to recover from Honeywell even though no *qui tam* lawsuit was ever initiated is supported by cases on the district court level interpreting section 3730(h) and by the great weight of authority of cases construing similar federal whistle blower protection statutes.

148. By encouraging employees to disclose potentially fraudulent claims, the Government sets off a chain reaction which leads to fewer fraudulent claims against the Government. First, employees come forward with a greater number of potentially fraudulent claims. This means that more fraudulent claims are discovered, and therefore, there are fewer fraudulent claims against the Government.

149. Although some cases do suggest that *qui tam* litigation is required to invoke the protection of section 3730(h), these cases fail to adequately consider the legislative history and purpose behind Section 3730(h). See *Neal v. Honeywell, Inc.*, 826 F. Supp. 266 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994).

150. *Rehman v. ECC Int'l Corp.*, No. 90-425-Civ-Orl-22, 1993 WL 85758 (M.D. Fla. 1993).

151. See *supra* notes 74-75 and accompanying text (discussing the facts and the holding in *Rehman*).

152. 836 F. Supp. 720 (E.D. Cal. 1993).

153. See *supra* note 120 (listing cases which hold that internal corporate whistle blowers should be afforded whistle blower protection).

B. *The Seventh Circuit Erroneously Limited Neal's Recovery*

In *Neal*, the Seventh Circuit found that the term, "special damages," did not extend beyond the damages expressed in section 3730(h) and held that Neal's recovery was limited to those expressed damages.¹⁵⁴ The court further held that an employer had no duty to inform its employees of their rights under the FCA, and therefore, declined to allow Neal to recover the damages she could have had in a *qui tam* suit.¹⁵⁵ This holding fails to consider the legislative history of section 3730(h).

The purpose behind the relief provision of section 3730(h) is to punish and deter fraudulent and discriminatory conduct on the part of contractors through retribution of double back pay, special damages and punitive damages, if warranted.¹⁵⁶ Allowing Neal her requested recovery would effectively punish Honeywell and provide strong deterrence for other contractors. However, the court in *Neal* did not want to extend the damages recoverable under section 3730(h) beyond its express language because it did not want to expose defendants to double recovery or chill settlements.¹⁵⁷ However, these reasons are not valid when considered in light of the legislative history of section 3730(h).

By allowing Neal to recover the damages she could have recovered in a *qui tam* suit, the court would not be exposing Honeywell to a double recovery. Instead, in line with the purpose of the relief granted by section 3730(h), the court would be punishing Honeywell for discriminating against Neal when she phoned the internal hotline to inquire about her options for reporting Honeywell's misconduct.¹⁵⁸ Additionally, even if awarding Neal her requested recovery would chill future settlements between the government and con-

154. *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994).

155. *Id.*

156. For a discussion of the purpose behind the relief provision of section 3730(h), see *supra* notes 69-72 and accompanying text.

157. See *supra* notes 140-41 and accompanying text (discussing the deleterious effects of allowing Ms. Neal to recover the damages she could have had in a *qui tam* suit).

158. When Neal first decided to come forward with her information, she called a Honeywell "hotline" in an attempt to determine her rights in remaining anonymous. Appellee's Brief at 2, *Neal* (93-3013). However, Honeywell's legal counsel told Neal that her only option was to tell him about the misconduct and that he would take care of it. *Id.* at 2-3. Honeywell did not inform Neal of her right to remain anonymous through a *qui tam* lawsuit. *Id.* This phone call eventually led to Honeywell's harassment of Neal. *Id.* See *supra* notes 89-91, 97-103 and accompanying text (discussing the steps Neal took to disclose Honeywell's fraud and the resulting harassment inflicted on Neal by Honeywell).

tractors, it would accomplish something much greater — it would deter future fraudulent claims. If a contractor knew that it could face the possibility of an award above and beyond its settlement with the government, it would reconsider its conduct. Although the court's decision does provide an employee with the express damages of section 3730(h), the purposes of deterrence and punishment would be better served by a decision that allowed an employee in Neal's situation to recover what she would have been entitled to under a *qui tam* suit.

The court also erroneously concluded that an employer has no duty to inform employees of their rights under the FCA.¹⁵⁹ This holding is not in line with authority interpreting a similar whistle blower provision and finding such a duty,¹⁶⁰ and may, in fact, encourage contractor fraud.¹⁶¹ Therefore, to discourage contractor fraud, the court should have held that an employer does have a duty to inform its employees of their rights under the FCA. Accordingly, the court could then have awarded Neal the recovery she could have had from a *qui tam* suit as punishment to Honeywell. Such a holding would then be in line with the intent that section 3730(h) serve as punishment for fraudulent creditors and the holding would not frustrate the purpose of the FCA.

IV. IMPACT

Given the extensiveness of fraud in the area of government defense contracts, it is likely that hundreds, or maybe even thousands, of employees nationwide are aware of fraudulent practices on the part of their employers.¹⁶² It is equally likely that those same employees are afraid to disclose their employers' practices because they, like Judith Neal, are not aware of their rights under the False

159. *Neal*, 33 F.3d at 865.

160. *See supra* note 136 (discussing authority finding such a duty).

161. For example, if an unscrupulous contractor has no duty to inform its employees of their rights under the FCA, the contractor will probably choose not to inform its employees of their rights. Then, if any employees find out about misconduct, they will not disclose such information for fear of losing their job, and the fraud will go undetected. Thus, the purpose of the FCA would be frustrated.

162. In 1983, the U.S. Merit Systems Protection Board conducted a survey to determine the extent of unreported fraud. *BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS*. A Report of the United States Merit Systems Board (1984). Of the approximately five thousand federal employees responding to the survey, 25% reported that they believed they had direct knowledge of fraudulent conduct by their employers but did not report it. *Id.* at 21.

Claims Act.¹⁶³ Unfortunately, according to the Seventh Circuit's decision in *Neal v. Honeywell, Inc.*,¹⁶⁴ those employees may never learn their rights because their employers do not have a duty to so inform them. On the other hand, the Seventh Circuit's decision in *Neal* does help alleviate employee fears by providing protection from employer retaliation regardless of whether a *qui tam* suit is ever filed.

The biggest impact from this decision is that plaintiffs like *Neal* will now be able to bring forward potentially fraudulent misconduct on behalf of their employers without the threat of being retaliated against if a *qui tam* suit is never filed. In this regard the decision is beneficial. It states that courts will no longer allow employers to retaliate against employees who legitimately attempt to aid a governmental investigation of fraud even if a suit under the FCA never comes to fruition. Thus, the Seventh Circuit extends protection under section 3730(h) to the largest possible class of employees while refusing to extend protection to the small, but present, class of employees who fraudulently institute *qui tam* actions in search of monetary gain. In this manner, the Seventh Circuit's decision upholds both the goals and purposes behind the FCA and section 3730(h) by encouraging employees to come forward with instances of potential misconduct and eliminating the concomitant fear of being left unemployed.

However, the court's decision also has a detrimental impact. If plaintiffs like *Neal* are unaware of their rights, their lack of knowledge will not soon be cured because, under *Neal*, their employers have no duty to inform them of their rights.¹⁶⁵ This portion of the decision is problematic because it is not consistent with the legislative history of section 3730(h) and frustrates its purpose. It does not allow sufficient punishment of unscrupulous contractors and it encourages fraudulent conduct. Instead of punishing unscrupulous contractors, it allows employers, like *Honeywell*, to learn of the fraudulent practices from their employee and then approach the government with a settlement proposal that significantly reduces the company's liability to just a fraction of what its fraudulent conduct

163. According to the survey by the U.S. Merit Systems Board, fear of employer reprisal was the second most cited reason for not reporting employer fraud. *Id.* at 24.

164. *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

165. The Seventh Circuit stated that the FCA does not require an employer to inform an employee of his or her right to file suit under the FCA's *qui tam* provisions. *Neal*, 33 F.3d at 865.

cost the government.¹⁶⁶ Allowing Neal to recover in such a situation would not subject employers to double recovery as the court suggests, but merely punish Honeywell and give Neal what should be rightfully hers. Additionally, this decision is problematic because it is inconsistent with interpretations of a similar whistle blower provision which placed this duty upon employers.

A remedy for this problem could take the shape of an amendment to the FCA in either one of two forms. First, if the relief provision of section 3730(h) was amended so that it read, "any special damages sustained as a result of the discrimination, including punitive damages, litigation costs and reasonable attorneys' fees," then Neal could recover the award she requested as punitive damages resulting from Honeywell's fraudulent and discriminatory conduct. This amendment would help further the goal of both the FCA and section 3730(h) by eliminating and discouraging fraudulent conduct on the part of government contractors through punishment and deterrence.

An alternative amendment could take the form of a new subsection to the FCA requiring employers to inform employees about their rights under the FCA.¹⁶⁷ This amendment would also encourage employees to bring forth contractor misconduct because employees would be fully informed of their rights and be able to proceed with confidence that any retaliatory conduct on the part of their employer would be punished. Therefore, either proposed amendment would help encourage the assistance of private citizens in disclosing fraud against the government and discourage fraudulent misconduct on the part of contractors.

V. CONCLUSION

Under the decision of *Neal v. Honeywell, Inc.*,¹⁶⁸ plaintiffs like Judith Neal are provided protection from employer retaliation in response to the employee's disclosure of potentially fraudulent misconduct whether or not a qui tam lawsuit is ever instituted. However, if the plaintiffs do not know their rights under the False Claims

166. In Honeywell's case, they were able to reduce their liability by over eighty percent. See *supra* note 88 and accompanying text & *supra* note 95 (discussing the actual cost of Honeywell's fraudulent conduct and the amount of Honeywell's settlement with the government).

167. Informing employees could be done simply by placing a notice on company bulletin boards.

168. 33 F.3d 860 (7th Cir. 1994).

Act,¹⁶⁹ their employers will probably never inform them because employers have no duty to inform their employees of their rights. Consequently, if the government learns of the employer's fraudulent conduct but settles with the employer before filing an action under the FCA, the plaintiff is not entitled to any of the recovery he or she could have had if a *qui tam* action had been brought. In addition, the employer can thus avoid paying all but a small fraction of his total liability to the government. Such a result does not punish the employer at all and may encourage fraudulent conduct.

The result in *Neal* is consistent with the intended purposes of the FCA in that providing protection to employees whether or not a *qui tam* suit is instituted encourages employees to come forward with their information. However, the result is also inconsistent with the intended purposes of the FCA in that it does not punish the fraudulent contractor sufficiently to deter future conduct. Therefore, although the Seventh Circuit decision correctly provides protection for an employee where a suit by the government against the employer never results, courts need to go further to punish employers and grant employees the recovery to which they are entitled.

Timothy P. Olson

169. 31 U.S.C. §§ 3729-30 (1988).